

CHAPTER 5

DEVELOPMENT OF COMPLETE AND IMPARTIAL FACTUAL RECORDS

PURSUANT TO 29 C.F.R. PART 1614

I. INTRODUCTION

Section 1614.108(b) requires that "the agency shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint." Pursuant to that regulation, this chapter prescribes the Equal Employment Opportunity Commission's standards for completeness and impartiality in factual findings on formal complaints of discrimination.

This chapter is intended to ensure that Federal agencies consistently develop sound factual bases for findings on matters raised in equal employment opportunity complaints while retaining the maximum flexibility in the use of fact-finding techniques and in the use of established dispute resolution plans. This directive is not intended as an exhaustive guide for conducting investigations, but represents the standard that the Commission should expect in an investigation.

II. CONTENTS OF A COMPLAINT FILE

The complaint file will include the various documents and information acquired during fact-finding under this directive, indexed and tabbed in accordance with the instructions contained in this chapter. The file will include affidavits or statements of the complainant and witnesses, copies (or extracts) of records, policy statements, or regulations of the agency, organized to show their relevance to the complaint or the general environment out of which the complaint arose. It will also include transcriptions, notes, or minutes of proceedings conducted pursuant to this directive along with an investigative summary of the findings.

The complaint file will also include letters, notes, and copies of letters and notes by, to, or from the investigator, the complainant, the EEO staff or counselor concerning the processing of the complaint. It should include a copy of the

complaint and any notices of meetings and conferences. However, documentation concerning the substance of attempts to resolve the complaint during informal counseling or during any alternative dispute resolution procedure should not be included in the complaint file.

III. RESPONSIBILITIES

A. Director of Equal Employment Opportunity

The Director of Equal Employment Opportunity shall ensure that (1) all issues listed are investigated, (2) that all employees of the agency cooperate in the investigation, and (3) that witness testimony is given under oath or affirmation and without a promise that the information will be kept confidential.

The Director will also ensure that individual complaints are properly and thoroughly investigated and that final decisions are issued in a timely manner in accordance with 29 C.F.R. § 1614.110.

B. Equal Employment Opportunity Investigator

The equal employment opportunity investigator is a person officially designated and authorized to conduct inquiries into matters raised in equal employment opportunity complaints. The authorization includes the authority to administer oaths and to require employees to furnish testimony under oath or affirmation without a promise of confidentiality.

C. Complainant

The complainant must cooperate in the investigation and keep the agency informed of his/her current address. Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, coupled with a 15-day notice of proposed dismissal, a failure to respond could result in dismissal of the complaint. § 1614.107(g).

IV. INVESTIGATION

An investigation of a formal complaint of discrimination is an official review or inquiry, by persons authorized to conduct such inquiries or reviews, into matters raised in an equal employment opportunity complaint.

The investigative process is non-adversarial. That means that the investigator is obligated to collect evidence regardless of the parties' positions with respect to the items of evidence.

Models for the analysis of common types of discrimination cases appear at Attachment A to this Chapter.

A. Methods of Investigation

1. Statement of Issues Accepted

A copy of a statement of the issues accepted for investigation shall be provided to the investigator prior to the commencement of the investigation. The statement of issue must agree with those issues contained in the acknowledgement letter to the complainant.

2. A Variety of Fact-Finding Techniques Allowed

Investigative inquiries may be made using a variety of fact-finding models, such as the interview or the fact-finding conference, and a variety of devices, such as requests for information, position statements, exchange of letters or memoranda, interrogatories, and affidavits. The inquiry/review process may also incorporate some of the features of a dispute resolution plan.

B. Purpose of the Investigation

The purpose of the investigation is to (1) gather facts upon which to base a determination as to whether an agency subject to coverage under the statutes which the Commission enforces in the Federal sector has violated

a provision of any of those statutes¹ and (2) if a violation is found, to have a sufficient factual basis from which to fashion an appropriate remedy.

C. General Investigative Requirements

The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group as compared with the treatment of other similarly situated employees, and any policies and/or practices which may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant.

V. THE ROLE OF THE INVESTIGATOR

A. Collecting and Discovering Factual Information

The role of the investigator is to collect and to discover factual information concerning the issues in the complaint under investigation and to prepare an investigative summary.

B. Variety of Methods Available

The investigator may accomplish his/her mission in a variety of ways. The investigator may function as:

1. a presiding official at a fact-finding conference,
2. an examiner responsible for developing material evidence,

¹ The Commission enforces: 1) section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16; 2) sections 501 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791 and 794a; 3) section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a; and 4) the Equal Pay Act Section 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 296(d).

3. an issuer of requests for information in the form of requests for the production of documents, interrogatories, and affidavits, and/or,
4. a face-to-face interviewer in on-site visits.

C. Investigator Must Be Unbiased and Objective

In whatever the mix of fact-finding activity selected for a particular case, the investigator must be and must maintain the appearance of being unbiased, objective, and thorough. (S)he must be neutral in his/her approach to factual development. The investigator is not an advocate for any of the parties or interests and should refrain from developing allegiances to them. In addition, the following rules must be observed:

1. The person assigned to investigate shall not occupy a position in the agency that is directly or indirectly under the jurisdiction of the head of that part of the agency in which the complaint arose.
2. The investigator, if a contract investigator, shall not have been hired by or be obligated to the person(s) involved in the matter(s) giving rise to the complaint. For example, where the contract monitor of EEO investigation contracts is alleged to have been involved in discriminatory activity, the use of the usual contract investigator would create an apparent bias because there is at best the appearance that the contract investigator could not be impartial.
3. An agency is prohibited, in some situations, from using its own immediate investigative resources, even though the investigation of discrimination complaints in the Federal service is primarily an agency function and responsibility. In such cases the agency shall use alternatives, such as contract investigators or other outside sources. Such situations include, but are not limited to:
 - (a) Particularly sensitive cases involving high-level officials (e.g., complainant is an immediate subordinate of the head of the agency and the head of the agency is alleged to have taken discriminatory action).

- (b) Potential conflict of interest (e.g., complainant is an employee in the EEO office and names the EEO director as the person taking the wrongful action).
- (c) A small agency unable to carry out an unexpected EEO workload (e.g., an agency with less than 450 employees has a staff of part-time or ad hoc EEO investigators and is unable to absorb an additional investigative caseload).

D. Investigator Must Be Thorough

This means identifying and obtaining all relevant evidence from all sources regardless of how it may affect the outcome.

The investigator need not concern himself/herself with balancing the amount of evidence supporting the complainant as compared with the amount of evidence supporting the agency. To ensure a balanced record, it is necessary only to exhaust all sources likely to support the complainant and the respondent. An investigation conducted in this manner might reveal that there is ample evidence to support the complainant's allegations and no evidence to support the agency's version of the facts, or vice versa. Nevertheless, this investigation would be complete.

VI. EVIDENCE

A. Quality of Evidence

Evidence will be gathered from the complainant, witnesses, and other sources. In order to support findings and ultimately decisions, this evidence should be material to the complaint, relevant to the issue(s) raised in the complaint, and as reliable as possible.

1. Material Evidence

Evidence is material when it relates to one or more of the issues raised in the complaint or raised by the agency's answer to it. To determine whether evidence is material, one must look to the allegations of discriminatory conduct and resultant harm contained

in the complaint and the agency's answers to the allegations. If the evidence relates to one or more of those matters, then it relates to matters at issue and it is material.

2. Relevant Evidence

Evidence is relevant if it tends to prove or disprove a material issue raised by a complaint. Relevancy and materiality are often used interchangeably. Generally, relevance is the more important concept in an investigation. If evidence is not relevant, whether it is material is of little consequence. A test of relevance is to ask, "What does this evidence tend to prove?" If the answer is that it tends to prove or disprove a proposition that is related to the complaint, then the evidence is relevant.

3. Reliable Evidence

Evidence is reliable if it is dependable or trustworthy. Evidence should not be ignored because it is of questionable reliability. Such evidence may lead to evidence that is reliable.

Some factors to consider in determining whether testimony is reliable are: whether the witness' testimony is based on his/her own experience and personal knowledge, or based on rumor, hearsay, or innuendo; whether the testimony is a statement of fact or is merely a conclusion; and whether witnesses have an interest in the outcome of the complaint, or are otherwise biased.

Some factors to consider in determining whether documents are reliable are: whether they were prepared in response to the investigation or whether they are maintained in the ordinary course of business; whether they are obtained from the custodian of records or the author of the document; whether they are copies or original documents and whether the documents are signed and/or dated.

The rules of evidence were designed to set limits on the reliability of documents and testimony entered in evidence in court. Such **formal rules will not be strictly applied** in the collection of

evidence for the investigation of Federal equal employment opportunity complaints. Such rules may be used, however, as a guide in assessing the evidentiary weight to be given particular items of evidence.

B. Types of Evidence

There are many types of evidence which can be obtained on the issues raised in an equal employment complaint. The three basic types of evidence are circumstantial evidence (e.g. comparative evidence or other evidence giving rise to an inference of discrimination), direct evidence, and statistical evidence.

1. Comparative Evidence

Comparative evidence must be sought in every case alleging disparity in treatment on a basis protected by a law enforced by the EEOC.

One of the challenges of developing comparative evidence is gathering sufficient evidence to determine whether the comparators are similarly situated with respect to the complainant. In general, similarly situated means that the persons who are being compared are so situated that it is reasonable to expect that they would receive the same treatment in the context of a particular employment decision. It is important to remember that individuals may be similarly situated for one employment decision, but not for another. For example, a female GS-4 clerk-typist may be similarly situated to a male GS-7 paralegal in a discrimination case involving the approval of annual leave where the same rules are applied to both by the same supervisor or where both are in the same unit or subject to the same chain of command. The investigator would be obligated to find out whether there were indeed persons, not named by the complainant but similarly situated, whose treatment could be compared to the complainant's treatment.

2. Direct Evidence

Direct evidence of discrimination consists of facts which reveal that intentional discrimination caused an adverse action without the need to resort to inference or circumstantial evidence.

Direct evidence is relevant in cases involving disparate treatment where the question is whether the employer intentionally treated employees differently because of a protected factor. It is also relevant in cases involving the effect of policies where the question is whether the policy disparately treats all employees in the protected class.

Direct evidence is rare. The statement "I would never hire a woman for that job" is direct evidence of discrimination on the basis of sex in hiring.

3. Statistical Evidence

Statistical evidence or a survey of the general environment will be conducted as appropriate. For example, this evidence may be probative when allegations involve comparative treatment of groups, as in an allegation of a pattern or practice of discrimination, or the adverse effect of an agency policy or practice.

C. Sources of Evidence

1. The Complainant

The equal employment opportunity complaint will generally provide the initial information concerning the bases, issues, and incidents which gave rise to the complaint of discrimination. The complaint may also indicate the reason, if any was given, for any adverse employment decision. Additional background and detailed information must be obtained from the complainant and recorded through written questions and answers (interrogatories), recorded interviews (using handwritten notes or verbatim transcription), an exchange of letters or memoranda, or a fact-finding conference. This information should include medical documentation, where necessary. Witness testimony intended to be made a part of the complaint file should be made under oath or affirmation or penalty of perjury.

Volume II of the EEOC Compliance Manual will assist in developing inquiries. That volume contains substantive topics arranged in sections. Most sections contain advice on what questions to ask when certain issues are raised. The Commission's Compliance Manual is published commercially and is available at many libraries and at the Commission's district, area, and field offices.

2. The Agency

Information from the agency may be obtained initially through a request for information. Consult the agency Director of EEO or EEO officer for instructions concerning to whom to direct the request. The EEOC Compliance Manual, Volume I, Section 26.3 provides some guidance on developing requests for information.

Follow-up information should be obtained in a variety of ways, including further requests, affidavits, interrogatories, or a fact-finding conference.

In most instances, the individual who initiated or enforced the decision about which the complaint was filed should be interviewed early in the investigation. His/her reasons for the action will often open other avenues to explore.

3. Witnesses

Witnesses can be identified by asking the complainant, the official involved in the alleged discriminatory action, or other obvious witnesses if they are aware of other persons who might have information related to the complaint. Witnesses need not be employees at the respondent agency.

- a. The EEO staff may be of some assistance in discovering other witnesses, but they should rarely be witnesses themselves. Their information will usually be hearsay and their use as a witness would compromise their objectivity. The primary source of the information is required.

- b. Witness bias should be noted when it is discovered. The following should be noted: 1) Favorable feelings toward a party based on a mutual alliance, family ties, or close friendship; 2) hostility to a party, because of a past disagreement; and 3) self-interest in the outcome of the complaint are some indicators of potential bias. The indicators should be made a part of the record, and efforts should be made to corroborate the testimony. The weight accorded the evidence adduced from such witnesses will be governed by the degree to which it can be determined that the bias colored the testimony.

4. Documentary Evidence

All relevant documents should be obtained. The complainant, the supervisor, the manager who took the personnel action, or the personnel office of the agency, may be sources to help identify relevant documents.

Statistical evidence can usually be obtained through the EEO Office or the personnel office of the agency.

D. Evidence on the Question of Remedies

Where it appears to an agency that a finding of discrimination is likely, evidence should be gathered from which an appropriate remedy can be fashioned. This essentially means that a determination of the parameters of full relief should be made and the appropriate inquiries developed. Agencies should be aware that, during the investigative process, they need to address evidence that may be used in connection with framing remedies. Evidence on the question of remedies may include evidence of a complainant's interim earnings or subsequent promotions (in a discharge or non-promotion case) or other mitigating factors. See Chapter 9 on full relief.

VII. Witnesses and Representatives in the Federal EEO Process

The procedures outlined here relate specifically to the processing of individual complaints of discrimination under section 1614.108. The principles reflected in these procedures, however, should also guide the processing of class complaints of discrimination under section 1614.204.

A. Disclosure of Investigative Material to Witnesses**1. To the complainant**

The complainant must receive a copy of the complaint file and a transcript of the hearing, if a hearing is held.

2. To other witnesses

Agencies may disclose information and documents to a witness where the investigator determines that the disclosure of the information or documents is necessary to obtain information from the witness, e.g. to explain the allegations in a complaint or to explain a manager's articulated reason for an action in order to develop evidence bearing on that reason.

3. The Agency Official Alleged to Have Discriminated Against the Complainant

The agency official responsible for allegedly discriminatory activity is a witness and is entitled to no more rights than any other witness. This has not always been so. On March 13, 1978, The former U.S. Civil Service Commission, in a Federal Personnel Manual (FPM) Letter 713-42, titled Participation in the Discrimination Complaint Process of Persons Named as "Alleged Discriminatory Officials," set forth guidance on the participation in the EEO process of persons alleged to have discriminated against complainants. The EEOC adopted the substance of that guidance on November 29, 1978 [See 43 Fed Reg. 60901]. For many years that guidance controlled the ADO's access to complaint file information. On October 15, 1987, the EEOC revoked its adoption of several FPM Letters and Civil

Service Commission Bulletins, but retained the ADO participation provisions. Then, effective November 30, 1987, the EEOC adopted new EEO complaint procedures which deleted the term and concept of an ADO [52 Fed. Reg. 41920, October 30, 1987]. In the supplementary information, the EEOC expressed the view that an individual who is named or is identified as the person responsible for the action which gave rise to a complaint is a witness whose participation in the complaint process should not be materially different from that of any other witness.

After the Commission's deletion of the term and concept of an ADO, some Federal agencies decided to coin new terms for ADO's, such as "Responsible Management Officials", "Responding Management Officials," and others. From a legal standpoint, complaints are filed against Federal agencies as entities regardless of whether a complainant names or identifies the person responsible for the action which gave rise to the complaint.

The agency is responsible for remedial action in the event that it is determined that the complainant has been discriminated against illegally. Agencies must determine, on a case-by-case basis, whether individual employees should be disciplined. However the disciplinary matter is a matter separate from whether discriminatory conduct has occurred. The primary purpose of the complaint process is to determine whether discriminatory conduct occurred and not to provide a separate set of rules for agency officials who are identified as being responsible for the actions which gave rise to the allegations of discrimination.

The responsible management official should have access to case materials to the extent needed to respond to allegations and give evidence. The agency has the burden of determining what case material may be released in accordance with The Privacy Act.

Agencies should treat all witnesses consistently and fairly. They should be fully informed of the nature of a counselor's or an investigator's inquiry and allowed to respond fully to the inquiry and informed of the right to be represented at any stage of the EEO complaint process.

B. Travel Expenses**1. Witness Employed by Federal Government**

Section 1614.605(f) requires that, when the presence of a witness is required or authorized by agency or Commission officials in connection with a complaint, the witness be in an official duty status. A witness is entitled to travel expenses. If a witness is employed at an agency other than the one against which the complaint is brought and must travel to provide the attestation or testimony, the witness is entitled to reimbursement for travel expenses. The current employing agency of a Federal employee must initially authorize and pay the employee's travel expenses and is entitled to reimbursement from the responding agency which is ultimately responsible for the cost of the employee's travel. Decision of the Comptroller General, Matter of John Booth - Travel Expenses of Witness - Agency Responsible, File: B-235845, 69 Comp. Gen. 269 (1990).

2. Outside Complainant or Applicant Not Employed by Federal Government

The agency is not responsible, however, for paying the travel expenses of an "outside" complainant or applicant. Although the complainant who, for purposes of his/her complaint is a witness, may once have been employed by the agency against whom she/he complains, the termination of the employment status with the Federal government also terminates any Federal obligation to pay travel expenses associated with prosecution of the complaint. Decision of the Comptroller General, Matter of: Expenses of Outside Applicant Complainant to Travel to Agency EEO Hearing, File: B-202845, 61 Comp. Gen. 654 (1982).

C. Official Time

Section 1614.605 provides that complainants are entitled to a representative of their choice during pre-complaint counseling and at all stages of the complaint process. Both the complainant and the representative, if they are employees of the agency where the complaint arose and was filed, are entitled to a reasonable amount of official time to present the complaint and

to respond to agency requests for information, if otherwise on duty. Witnesses who are Federal employees, regardless of whether they are employed by the respondent agency or some other Federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with the complaint.

1. Reasonable Amount of Official Time

"Reasonable" is defined as whatever is appropriate, under the particular circumstances of the complaint, in order to allow a complete presentation of the relevant information associated with the complaint and to respond to agency requests for information. The actual number of hours to which complainant and his/her representative are entitled will vary, depending on the nature and complexity of the complaint and considering the mission of the agency and the agency's need to have its employees available to perform their normal duties on a regular basis. Complainant and the agency should arrive at a mutual understanding as to the amount of official time to be used prior to the complainant's use of such time.

2. Meeting and Hearing Time

Since most of the time spent by complainants and their representatives during the processing of a typical complaint is spent in meetings and hearings with agency officials or with EEOC administrative judges, and since complainants and their representatives generally have no control over the length of those meetings and hearings, whatever time is spent in such meetings and hearings is automatically deemed reasonable. Stated another way, whenever the presence of a complainant and/or his/her representative is required by an agency or an EEOC official in connection with an investigation or hearing on the complaint, both the complainant and the representative are to be granted official time for the duration of such meetings or hearings and are in a duty status regardless of their tour of duty.

3. Preparation Time

Since presentation of a complaint involves preparation for meetings and hearings, as well as attendance at such meetings and hearings, complainants and their representatives are also afforded a reasonable amount of official time, as defined above, to prepare for meetings and hearings. They are also to be afforded a reasonable amount of official time to prepare the formal complaint and any appeals that may be filed with the Commission, even though no meetings or hearings are involved. However, because investigations are conducted by agency or Commission personnel, the regulation does not envision large amounts of official time for preparation purposes. Consequently, "reasonable," with respect to preparation time (as opposed to time actually spent in meetings and hearings), is generally defined in terms of hours, not in terms of days, weeks, or months. Again, what is reasonable depends on the individual circumstances of each complaint.

4. Aggregate Time Spent on EEO Matters

The Commission considers it reasonable for agencies to expect their employees to spend most of their time doing the work for which they are employed. Therefore, an agency may restrict the overall hours of official time afforded to a representative, for both preparation purposes and for attendance at meetings and hearings, to a certain percentage of that representative's duty hours in any given month, quarter, or year. Such overall restrictions would depend on the nature of the position occupied by the representative, the relationship of that position to the mission of the agency, and the degree of hardship imposed on the mission of the agency by the representative's absence from his/her normal duties. The amount of official time to be afforded to an employee for representational activities will vary with the circumstances.

Moreover, section 1614.605(c) provides that, in cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative. At all times, the complainant

is responsible for proceeding with the complaint, regardless of whether (s)he has a designated representative.

The Commission does not require agencies to provide official time to employee representatives who are representing complainants in cases against other Federal agencies. However, the Commission encourages agencies to provide such official time.

D. Duty Status/Tour of Duty

For purposes of these regulations, "duty status" means the complainant's or representative's normal hours of work.

It is expected that agency and Commission officials will, to the extent practical, schedule meetings and hearings during the complainant's normal working hours and that agency officials shall provide official time for complainants and representatives to attend such meetings and hearings.

If meetings and hearings are scheduled outside of the complainant's or the representative's normal work hours, agencies should adjust or rearrange the complainant's or representative's work schedule to coincide with such meetings or hearings, or grant compensatory time or official time to allow an approximately equivalent time off during normal hours of work. The selection of the appropriate method for making the complainant or representative available in any individual circumstance shall be within the discretion of the agency.

Any reasons for an agency's denial of official time should be fully documented and made a part of the complaint file.

Witnesses who are Federal employees, regardless of their tour of duty and whether they are employed by the respondent agency or another Federal agency, must be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint.

E. Use of Government Property

Since the filing of an EEO complaint is a personal matter, the complainant's use of government property in the processing of the complaint must be authorized by the agency.

VIII. COMPLAINT FILE**A. Contents of the Complaint File**

The complaint file will be assembled in a suitable binder, have a title page (see Appendix B of this chapter), and contain all documents pertinent to the complaint, including the following:

1. The notice of the EEO counselor to the complainant pursuant to 29 C.F.R. § 1614.105(d).
2. The written report of the EEO counseling efforts pursuant to § 1614.105(c), and any attached documents.
3. A copy of the complaint.
4. Acknowledgment of filing of complaint.
5. If the complaint is withdrawn in whole or in part, or otherwise amended or changed, the withdrawal or changes must be in writing and signed by the complainant. A copy of the signed withdrawal or change must be made a part of the complaint file.
6. If adjustment or resolution of the complaint is reached, the terms of the adjustment or resolution must be reduced to writing and included in the complaint file.
7. A notice of issues to be investigated.
8. A record of any activity before the EEOC, Office of Federal Operations.

9. Evidence collected by the investigator.
10. A summary of the investigation.

B. Features of the Complaint File

The completed complaint file shall have the following features:

1. Case Index to documents and exhibits.
2. Tabbed sections for documents, exhibits, and explanatory material.
3. A typed summary of the investigation signed and dated by the investigator and containing a discussion and analysis of the evidence. See section VIII of this chapter and volume 2, EEOC's Compliance Manual for further guidance.

C. Format for the Complaint File

The following is a suggested format for complaint files.

Binder	Heavy-duty cover or binder.
Title Page	See Attachment B.
Summary	Summary of Investigation / Summary analysis of the facts.
Case Index	The index to the file should list the contents of the file by tab and sequential page number.
Tab A	Tab A should contain the formal complaint and documents submitted by the complainant. (Individual documents under each tab should be consecutively numbered in addition to being identified as part of the tab. Example A-1, A-2, A-3, etc.).

Tab B	Tab B should contain the EEO counselor's report and all documents generated in the informal process. Included here should be the notice of right to file a complaint.
Tab C	Tab C should contain the agency's notice of issues to be investigated pursuant to section IV.A.1. of this chapter. Copies of any other documents bearing on delineation of the issues to be investigated should also be included.
Tab D	Tab D should contain documentation of attempts at informal resolution.
Tab E	Tab E should contain any documentation of appellate activity and any decisions affecting the processing of the complaint.
Tab F	Tab F should contain the evidence and documents in a logical order, with documents further separated by numerical tabs as necessary.
Tab G	Tab G should contain any miscellaneous material.

D. Availability of Complaint Files

The complainant and his/her representative shall be entitled to one copy each of the complaint file and investigative summary at the time that the investigation is completed.

E. Disposition of Complaint Files

1. Effective October 1, 1980, the former National Archives and Records Service revised General Records Schedule 1, Item 26, titled Equal Employment Opportunity Records, to reflect the transfer of the appeals function from the Office of Personnel Management to the Equal Employment Opportunity Commission. General Records Schedule 1, Item 26 provides:

26. Equal Employment Opportunity Records.

a. Official Discrimination Complaint Files.

Originating Agency's file containing complaints with related correspondence, reports, exhibits, withdrawal notices, copies of decisions, records of hearings and meetings, and other records as described in 29 C.F.R. § 1613.222 [now 29 C.F.R. Part 1614,²

Authorized Disposition

Destroy 4 years after resolution of case.

2. The agency originating the equal employment opportunity case will retain the original ("official") file during the appeals process and send only duplicate copies of documents to EEOC for use in the appeal. The agency sending the duplicates will certify that the file contains everything that is in the original.
3. EEOC will create documents relating to the appeal, but will file such documents apart from the materials sent by the originating agency. After resolution of the appeal, the Commission will destroy all duplicate materials, but will retain the appeals documentation for four years. The originating agency will retain the original file for four years after resolution of the case. EEOC will retain the appeals documentation and will answer Freedom of Information Act requests on the appeals file. The EEOC will maintain the security of documents as required by Federal Statutes and Executive Orders.
4. The originating agency will be responsible for retiring the original case file to the Federal Records Center, and answering Freedom of Information Act requests on the original file. Requests for

² See section II of this chapter for a description of the documents contained in the complaint file. There is no difference intended with respect to the items that may be destroyed after 4 years.

disclosure, which the EEOC determines are requests for the agency's complaint file, will be forwarded to the agency for a response.

5. Further information concerning the disposition of records under this section may be obtained by contacting:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, D. C. 20036

Telephone : (202) 663-4517
TDD : (202) 663-4593

IX. THE INVESTIGATIVE SUMMARY

The investigative summary is a narrative document which succinctly states the issues and delineates the evidence addressing both sides of each issue in the case. The summary should state facts (supported in the complaint file) sufficient to sustain a conclusion(s), but should not state the conclusion(s).

[Attachment A-1]

**MODEL FOR ANALYSIS
DISPARATE TREATMENT**

PRIMA FACIE CASE

- 1) **Membership in protected group**
- 2) **Complainant treated differently from similarly situated employees not in protected group**
 - a) **Were compared employees in same chain of command as Complainant?**
 - b) **Were compared employees in same work unit as Complainant?**

OR

Is there direct evidence that shows discriminatory intent?

REBUTTAL

What did the agency say was the reason for its treatment of Complainant and compared employees?

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for its treatment of Complainant is pretextual?

[Attachment A-2]

**MODEL FOR ANALYSIS
HIRING/PROMOTION**

PRIMA FACIE CASE

- 1) Was Complainant a member of a protected group?**
- 2) Was there a vacancy?**
- 3) Did Complainant apply?**
- 4) Was Complainant qualified; was Complainant rejected?**
- 5) Was the vacancy filled? If so, was the selectee a member of Complainant's protected group?**

OR

Is there direct evidence that shows discriminatory intent?

REBUTTAL

What did the agency say was the reason for rejecting Complainant?

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for rejecting Complainant is pretextual?

[Attachment A-3]

**MODEL FOR ANALYSIS
DISCHARGE/DISCIPLINARY ACTION**

PRIMA FACIE CASE

- 1) **Membership in protected class**
- 2) **Qualified for the position he or she was performing**
- 3) **Satisfied normal requirements of position**
- 4) **Discharged or otherwise disciplined**
- 5) **Replaced by an employee outside the protected group or singled out for discharge or discipline while similarly situated employees were retained or not comparably disciplined**

OR

Is there direct evidence that shows discriminatory intent?

REBUTTAL

What did the agency say was the reason for disciplining Complainant?

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for discipline or discharge of Complainant is pretextual? E.g., Did the agency treat other individuals with similar performance problems more favorably than complainant?

[Attachment A-4]

**MODEL FOR ANALYSIS
RETALIATION**

PRIMA FACIE CASE

- 1) Complainant previously engaged in protected activity or opposed unlawful discrimination.**
- 2) Agency was aware of Complainant's activity.**
- 3) Complainant was contemporaneously or subsequently adversely affected by some action of agency.**
- 4) Some nexus exists between Complainant's activity and the adverse employment decision (e.g., the adverse employment decision occurred within such a period of time that a retaliatory inference arises).**

OR

Is there direct evidence that shows discriminatory intent?

REBUTTAL

What did the agency say was the reason for the adverse employment decision?

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for the employment decision is pretextual?

[Attachment A-5]

**MODEL FOR ANALYSIS
HANDICAP--REASONABLE ACCOMMODATION**

PRIMA FACIE CASE -- Where Complainant Alleges a Failure to Provide a Reasonable Accommodation:

- 1) Does complainant have a physical or mental impairment?**
- 2) Does this impairment substantially limit complainant's ability to perform a major life activity (e.g., caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working)? Provide evidence on the activities affected, how they are affected, and the degree to which they are affected (can't do the activity at all, can only do the activity with assistive devices or equipment, can only do the activity for a limited period of time, etc.).**
- 3) Does the agency know of the complainant's handicap?**
- 4) Is the complainant otherwise qualified? (i.e., Does the complainant meet the education and experience requirements of the job?)**
- 5) What are the essential functions of the complainant's job?**
- 6) Did complainant request accommodation?**
- 7) What action did the agency take to identify possible accommodation or attempt accommodation? What accommodation, if any, did the complainant suggest? What actions did the agency take to consider this accommodation?**
- 8) If an accommodation has been identified, will this accommodation enable complainant to perform the essential functions of the job?**
- 9) Did the agency provide an accommodation?**

[ATTACHMENT A-5 PAGE 2]

- 10) What reason has the agency given for its refusal?**
- 11) If the agency contends that a particular accommodation would impose an undue hardship on its operations, are these reasons sufficient to establish an undue hardship defense given:**
 - a) the overall size of the agency's program (the number of employees, number and type of facilities and size of budget);**
 - b) type of agency operation (composition and structure of work force);**
 - c) nature and cost of accommodation.**

[Attachment A-6]

**MODEL FOR ANALYSIS
HANDICAP--DISPARATE TREATMENT**

PRIMA FACIE CASE -- Where Complainant Alleges Disparate Treatment

- 1) Does complainant have a physical or mental impairment?
- 2) Does this impairment substantially limit complainant's ability to perform a major life activity (e.g., caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working)? Provide evidence on the activities affected, how they are affected, and the degree to which they are affected (can't do the activity at all, can only do the activity with assistive devices or equipment, can only do the activity for a limited period of time, etc.).
- 3) Does the complainant have a record or history of a substantially limiting impairment (from which the complainant may have recovered in whole or in part)?

OR

Was the complainant regarded as having such an impairment (whether or not the complainant has an impairment or a substantially limiting impairment)?

- 4) Does the agency know of the complainant's handicap?
- 5) Is complainant qualified to perform the essential functions of the job with or without reasonable accommodation:
 - a. Is the complainant otherwise qualified (i.e., does the complainant meet the educational and experience requirements of the job)?
 - b. What are the essential functions of the complainant's job?
 - c. Can complainant perform the essential functions of the job with or without accommodation? If an accommodation is necessary, see Model for Analysis -- Handicap -- Reasonable Accommodation, Attachment A-5.

[ATTACHMENT A-6 PAGE 2]

- 6) Was the complainant treated differently from similarly situated employees who were not handicapped or who had different handicaps?**
- a. Were compared employees in the same chain of command?**
 - b. Were compared employees in the same work unit?**

OR

Is there direct evidence which shows discriminatory intent?

REBUTTAL

What did the agency say was the reason for treating complainant differently than other similarly-situated employees who were not handicapped or who had different handicaps?

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for its treatment of complainant is pretextual?

[Attachment A-7]

**MODEL FOR ANALYSIS
HANDICAP -- REASSIGNMENT**

PRIMA FACIE CASE -- Where Complainant Requests Reassignment Pursuant to 29 C.F.R. § 1614.203(g)

- 1) Has the Complainant successfully completed his/her probationary period with the agency?**
- 2) Does Complainant have a physical or mental impairment?**
- 3) Does this impairment substantially limit complainant's ability to perform a major life activity (e.g., caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working)? Provide evidence on the activities affected, how they are affected, and the degree to which they are affected (can't do the activity at all, can only do the activity with assistive devices or equipment, can only do the activity for a limited period of time, etc.).**
- 4) Is the complainant no longer able to perform the essential functions of the position because of the handicap?**
- 5) Can the complainant perform the essential functions of another funded vacant position with reasonable accommodation if necessary?**
 - a. Is this new position located within the same commuting area, serviced by the same appointing authority, and at the same grade or level as the original position?**
 - b. In the absence of a position at the same grade or level, is reassignment to a vacant position at the highest available grade or level below the employee's current grade or level possible?**

**[ATTACHMENT A-7 Page 2]
Handicap -- Reassignment**

EXCEPTIONS TO THE DUTY TO REASSIGN NON-COMPETITIVELY

Has the agency already posted a notice or announcement seeking applications for the vacant position before determining that the non-probationary employee is unable to perform the essential functions of his/her current position even with a reasonable accommodation?

Did the handicapped person apply for the advertised position? If so, has the agency considered the handicapped person on an equal basis with those who applied for the position.

The term "individual with handicaps" shall not include an individual who is currently engaging in the illegal use of drugs. See 1614.203(h).

LIMITATIONS ON THE DUTY TO REASSIGN U.S. POSTAL SERVICE EMPLOYEES.

Is the complainant an employee of the U.S. Postal Service for whom a reassignment would be inconsistent with the term of any applicable collective bargaining agreement?

NOTE

There is no duty to reassign where an agency proposes the removal of a person with a handicap for failure to perform the essential duties of the position when such failure is not because of the handicap.

[Attachment A-8]

**MODEL FOR ANALYSIS
RELIGIOUS ACCOMMODATION**

PRIMA FACIE CASE

- 1) Does the complainant sincerely hold a religious belief which conflicts with employment requirements?
- 2) Has the complainant informed his/her superior of a conflict?
- 3) Has the complainant been penalized for failing to comply with employment requirements?

REBUTTAL

- 1) Belief or practice not of religious nature [rare: belief is not sincere]
- 2) Agency could not accommodate without undue hardship

DUTY TO ACCOMMODATE -- RELIGIOUS COMPENSATORY TIME

To allow employees to work additional hours (overtime, compensatory time) to make up for the time required by their personal religious belief (Pub. L. No. 95-390, 5 U.S.C. § 5550a, "Compensatory Time Off for Religious Observances").

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